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No. 91-6194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. CROSBY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law.

This case raises fundamental issues about the operation of our criminal justice system. In particular, the government's asserted right to try a defendant *in absentia* has potentially far-reaching consequences for the criminal justice system and the adversarial process on which it rests.

The ACLU has long believed that the adversarial process is critical to the fairness of the criminal justice system and has filed numerous briefs in support of that position, both as direct counsel and as *amicus curiae*. This case brings those issues once again before this Court.

STATEMENT OF THE CASE

In 1988, Michael J. Crosby and three codefendants were arrested and charged with crimes arising out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions.[2] Following his arrest, Crosby attended several pretrial conferences at which the court advised all parties that a trial date had been set for October 12, 1988. Additionally, the clerk of the court mailed a notice to Crosby's counsel confirming the trial date.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] These facts are derived from the opinion below. *See generally United States v. Crosby*, 917 F.2d 362 (8th Cir. 1990).

Despite this notice, Crosby failed to appear for trial on October 12 or to send any explanation for his absence. In response, the court issued a bench warrant for his arrest. When federal marshals were unable to locate Crosby by October 17, the district judge held the trial without him. In his absence, Crosby was convicted of twenty-five counts of mail fraud. Seven months later, Crosby was apprehended again and sentenced to four consecutive five-year terms on twenty-two of the counts.[3] He also received five years probation to commence upon completion of his prison term, during which he is required to pay $550,000 restitution to his victims.

In explaining his decision to try Crosby *in absentia*, the district judge noted that Crosby had "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." 917 F.2d at 363. The district judge also stressed that the 3 codefendants, all counsel, 54 jurors and over 80 witnesses had already gathered for the proceedings. These factors persuaded the district judge that it was impractical to reschedule the trial or to sever Crosby's case.

On appeal, Crosby argued that the decision to try him *in absentia* violated the plain meaning of Rule 43(a) of the Federal Rules of Criminal Procedure, which provides that "[t]he defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict . . . ."[4] Apparently relying

[3] He received a suspended sentence on the three remaining counts.

[4] Rule 43 provides, in pertinent part (emphasis added):

> (a) **Presence Required.** The defendant *shall be present* at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, *except as* (continued...)

on Rule 43(b), the Eighth Circuit held that Crosby had waived his right to be present at trial, even though the discussion of waiver in Rule 43(b) specifically refers to a defendant who is "initially present" when trial commences. Here, the Eighth Circuit acknowledged that Crosby was not "initially present" at trial within the meaning of Rule 43(b). Nevertheless, it declined to follow the literal wording of Rule 43 because it believed that a literal application of the Rule would produce an irrational result in this case.

SUMMARY OF ARGUMENT

This case raises a narrow question of statutory construction: What is meant by Rule 43 of the Federal Rules of Criminal Procedure? In our view, the answer to that question is simple and straightforward. Accordingly, there is no need for this Court to decide whether the Constitution would ever permit a criminal defendant

[4] (...continued)

> *otherwise provided by this rule.*
>
> (b) **Continued Presence Not Required.** *The further progress of the trial* to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present,*
>
> (1) is voluntarily absent *after the trial has commenced* (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

In addition, the Rule states that the presence of the defendant is not required in proceedings on offenses punishable by fine or imprisonment for not more than one year or both with the defendant's written consent. *See* Fed.R.Crim.P. 43(c).

to be tried *in absentia*. That hypothetical inquiry can and should be left for another day. Likewise, this case does not present any issue of inherent judicial authority. Whatever inherent authority might exist in the absence of a rule, it is the language of Rule 43 that must govern here.

Fairly read, the language of Rule 43 cannot be reconciled with the result below. In unambiguous terms, Rule 43 states that a criminal defendant "shall be present" at "every stage of the trial including the impaneling of the jury and the return of the verdict . . .", except in specific circumstances not applicable to these facts. This language is not discretionary and it does not suggest that the requirement of a defendant's presence at "every stage of the trial" is subject to further unenumerated exceptions.

The language of Rule 43 is also consistent with its legislative history. The Advisory Committee Notes on the Rules state that it codified existing precedent on the prosecution of absent defendants, *citing Lewis v. U.S.*, 146 U.S. 370 (1892), and *Diaz v. U.S.*, 223 U.S. 442 (1913). These decisions support the conclusion that a defendant may not be tried *in absentia* under the facts of this case.

Contrary to the view of the court below, Rule 43(b) neither compels nor authorizes a different conclusion. In particular, Rule 43(b)(2) was added in 1974 following the decision in *Illinois v. Allen*, 397 U.S. 337 (1970). Like *Allen* itself, Rule 43(b) permits the removal of a defendant who behaves disruptively during the course of proceedings. For present purposes, however, it is more significant that Rule 43(b) explicitly incorporates the threshold requirement that the defendant shall be "initially present" when trial begins.

Any decision to commence a trial in the defendant's absence indisputably raises substantial issues under the

Sixth and Fourteenth Amendments. The drafters of the Rule were aware of these constitutional issues and crafted a rule in light of them. If the Rule is to be redrafted, it should be done pursuant to the process that Congress created.[5] Until the Rule is redrafted, this Court should not anticipate a constitutional controversy that may never arise.

ARGUMENT

I. THE COURT SHOULD GIVE EFFECT TO THE PLAIN MEANING OF RULE 43

A. The Plain Meaning Of Rule 43, Like The Plain Meaning Of Any Statute, Is Controlling And Should Have Been Followed By The Courts Below

This case can be simply resolved by following the plain meaning of Rule 43. The question of whether the Constitution would ever permit a criminal trial to begin in the defendant's absence is an interesting one, but it is not before this Court. Likewise, the Court should not attempt to define what inherent authority a trial judge might possess to begin a trial in the defendant's absence if Rule 43 did not exist. Rule 43 exists, it is unambiguous, and its mandate must be obeyed.

This Court has repeatedly held that the meaning of a statute can best be determined by examining its language. If the statutory language is clear, no further "interpretation" is necessary or proper.[6] *See, e.g., Norfolk &*

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[5] *See* 28 U.S.C. §2071.

[6] This Court has long employed the traditional rules of statutory construction in interpreting the Federal Rules of Criminal Procedure, including application of the plain meaning rule. *See Hamling v. U.S.*, 418 U.S. 87, 134 (1974)(district court erred by ignoring the express (continued...)

Western Railway Co. v. American Train Dispatchers Ass'n, 499 U.S. ___, ___, 111 S.Ct. 1156, 1163 (1991)(the plain language of 49 U.S.C. §11341(a) exempts a carrier from the antitrust laws if a consolidation is approved by the Interstate Trade Commission); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126 (1990)(the plain language of Chapter 13 of the Bankruptcy Code required that debts include restitution obligations); *Mallard v. U.S. District Court for Southern District of Iowa*, 490 U.S. 296, 301 (1989); *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984)(determining that Congress intended nonprofit organizations to be eligible for attorneys' fees under 42 U.S.C. §1988); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)(Powell, J., concurring); *Prussian v. U.S.*, 282 U.S. 675, 677 (1931)(examined common use of term in an plain language of criminal statute).

By its express terms, Rule 43 does not permit a court to try a defendant *in absentia* except under clearly enumerated circumstances. Specifically, Rule 43(a) states that a defendant "*shall* be present . . . at every stage of the trial" (emphasis added). The only exceptions to this otherwise unequivocal mandate are set forth in Rule 43(b), which provides that "*further progress of the trial*" is permitted if the defendant absents himself "*after the trial has commenced*" or is "excluded from the courtroom" (emphasis added). Thus, a court does not have to halt a trial that has already begun because the defendant has stopped coming or because the defendant has been removed for disruptive behavior. Unless the language of the Rule is completely ignored, however, the trial cannot begin if the defendant is not there.

By holding that a trial may start without the defendant, the lower courts in this case have created a new exception to Rule 43(a) in the face of explicit language that the defendant's presence is required "except as otherwise provided" by the Rule.[7] If the Court allows the Eighth Circuit opinion to stand, this phrase in the Rule becomes mere surplusage, and the clear intention of the drafters would be undermined.[8] *See Hoffman v. Connecticut Income Dep't*, 492 U.S. 96, 103 (1989).

It is only under rare and exceptional circumstances that the Court will go beyond the unambiguous language of a statute. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), *citing Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *U.S. v. Locke*, 471 U.S. 84, 93-102 (1985); *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)(interpreting §17 of the Securities Act of 1933), *citing Tennes-*

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[6] (...continued)
terms of Fed.R.Crim.P. 30); *McCarthy v. U.S.*, 394 U.S. 459, 464 (1969)(district court erred in not doing what Fed.R.Crim.P. 11 expressly directs); *U.S. v. Robinson*, 361 U.S. 220, 224-25 (1960)(in examining the plain meaning of Fed.R.Crim.P. 45(b), the Court found that the circuit court's decision was in direct conflict with the Rule). This symmetry makes sense since the Federal Rules of Criminal Procedure are promulgated by this Court pursuant to statutory authority given it by Congress, 28 U.S.C. §2071. *See Atchison, T. & S.F. Ry. v. Scarlett*, 300 U.S. 471, 474 (1937).

[7] Because the Rule contains a general prohibition against trying an absent defendant, then specifically enumerates exceptions to the prohibition, courts may not imply additional exceptions. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980), *citing Continental Casualty Co. v. U.S.*, 314 U.S. 527 (1942). Only when a court finds evidence of legislative intent to imply additional exceptions can a court do so. 446 U.S. 608. No such evidence of intent exists here.

Moreover, the Rule contains no catch all phrase or general statement that would allow a court discretion to read other exceptions into the Rule. *See* Norfolk & Western Railway Co., 111 S.Ct. 1156.

[8] Only subsection (c) appears to allow a court to conduct a trial with a defendant *in absentia ab initio*, but subsection (c) only applies to "prosecutions for offenses punishable by fine or by imprisonment for not more than one year, or both."

see Valley Authority v. Hill, 437 U.S. 153, 187, n.33 (1978); *Howe v. Smith*, 452 U.S. 473, 483 (1981)(interpreting whether 18 U.S.C. §5003 permits a state prison authority to house a prisoner in a federal facility).

Here, the burden is on the government to show that a literal reading would lead to an untenable result. *See Griffin v. Oceanic Contractors*, 458 U.S. 564. Moreover, the Court has found untenable results only where the purpose of Congress in enacting the legislation would be thwarted by giving effect to its plain language. *See U.S. v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43 (1940); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

Stated another way, this Court has held that the plain meaning of a statute is conclusive absent a "clearly expressed legislative intention to the contrary." *Consumer Product Safety Comm'n*, 447 U.S. at 108; *U.S. v. Turkette*, 452 U.S. 576, 580 (1981)(interpreting the word "enterprise" in RICO, 18 U.S.C. §§1961-1968); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)(interpreting 42 U.S.C. §2000e-2(h)). *See also Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 157 (1983)(interpreting the Robinson-Patman Act's application to sales of pharmaceuticals to public hospitals for resale to the public). In this case, neither lower court pointed to any legislative history that even remotely suggests that a straightforward interpretation of Rule 43 would thwart its legislative purpose.

The plain language of Rule 43 is also inconsistent with any claim that Crosby's presence at arraignment was sufficient to satisfy the Rule's requirement that a defendant be "initially present" when trial begins. The Rule specifically and discretely refers to a defendant's presence "at the arraignment, at the time of plea, [and] at every stage of the trial . . . ." Arraignment, plea, and trial are not equivalent phases of a criminal proceeding.

The Rule itself implicitly recognizes that fact by describing them in separate clauses divided by commas.

Moreover, this grammatical formulation merely reinforces the common meaning of the words used in the Rule. *Martin v. Hunter*, 4 U.S. (1 Wheat) 304 (1816) (words in a statute should be given their common meaning absent some indication to the contrary); *see Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1931). In particular, the word "trial" is commonly understood to refer to a phase of the criminal proceeding that is distinct from both the arraignment and the plea.[9]

Arraignments and pleas are pretrial activities. *See Hamilton v. Alabama*, 368 U.S. 52, 54 n.4 (1961)("[u]nder federal law an arraignment is a *sine qua non* to the trial itself -- the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried"). *See also Crane v. U.S.*, 162 U.S. 625, 644 (1896). The arraignment informs a defendant of the charges against him or her.[10] *Garland v. Washington*, 232 U.S. 642, 644 (1914). *See also* Fed.R. Crim.P. 10.[11] The plea phase allows a defendant to state

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[9] Webster's College Dictionary (1991) at 1423:

> **Trial** n. 1a. the examination of a cause before a court of law . . .
> b. the use of due process to determine a person's guilt or innocence,
> 2. the act of trying, testing or putting to the proof.

[10] At least one court has construed Rule 43(a) in terms of its plain language, finding that defendant must be present at his arraignment. *In Re U.S.*, 784 F.2d. 1062 (11th Cir. 1986).

[11] Fed.R.Crim.P. 10 provides:

(continued...)

whether or not he or she is innocent and determines whether there will be a trial. *See* Fed.R.Crim.P. 11.[12] A trial, by contrast, involves the presentation of evidence.

Given the differences between arraignment, plea and trial, the plain language of Rule 43(a) can only be interpreted to mean that a criminal defendant must be present at each of these events. This reading of the Rule is further supported by the language of subsection (b), since it specifically requires that the trial be in progress before a court proceeds without a defendant under the enumerated exceptions.

If a literal application of the Rule causes administrative inconvenience, as both the district court and court of appeals seemed to think in this case, the appropriate procedure is to consider amending the Rule. *See* Point IC, *infra*. Unless and until the Rule is amended, however, it must be enforced as written. Furthermore, *amicus* believes that the administrative concerns voiced

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[11] (...continued)

> Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

[12] Fed.R.Crim.P. 11 provides, in pertinent part:

> (a) **Alternatives.**
>
> (1) **In General.** A defendant may plead not guilty, guilty, or *nolo contendere*. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty . . . .
>
> (g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or *nolo contendere*, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

by the court below, while well-meaning, are overstated. If the defendant had absconded before a trial date had been set, the district judge would presumably have faced the same choice of postponing the trial or severing Crosby's case.[13] A similar dilemma would have occurred if Crosby had gotten seriously ill on the eve of trial, after the jurors and witnesses had assembled. Such developments are unfortunate but they are hardly unprecedented and do not justify the decision in this case to ignore the plain meaning of Rule 43.

B. The Plain Meaning Of Rule 43 Is Consistent With The Prevailing Case Law At The Time The Rule Was Enacted

Rule 43(a) was adopted in 1944 as a restatement of existing law. Notes of Advisory Committee on Rules. According to the Advisory Committee, the Rule codified existing law. As examples of existing law, the Advisory Committee cited *Lewis v. U.S.*, 146 U.S. 370, and *Diaz v. U.S.*, 223 U.S. 442. Both *Lewis* and *Diaz* support Crosby's contention that the Rule required his presence at the outset of trial.

In *Lewis*, the Court determined that defendant's absence during the impaneling of the jury was reversible error. As the Court explained:

> [I]n felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during trial. "It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

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[13] In addition, it is important to note that bail jumping is a separate federal crime. *See* 18 U.S.C. §3150.

Id. at 372 (citation omitted). This statement makes clear the importance that the *Lewis* Court placed on the presence of the defendant at trial in felony cases. While it is true that the Court has stated that this right is not absolute, the Court has never ruled that the absence of the defendant from the inception of trial is a waiver of the right to be present. *See Illinois v. Allen*, 397 U.S. 337.

The *Diaz* case also supports the plain reading of the Rule. Diaz, who was charged with murder but free on bail, had been present when trial began. Subsequently, he failed to appear on two instances during the course of the trial, missing the direct testimony and cross-examination of two witnesses for the government. The Court held that his midtrial absence was a voluntary waiver of his right to be present during all phases of the trial under a Philippine statute. However, the Court made clear that this determination rested on the fact that Diaz was not in custody, that the offense was not a capital offense, and that he had been present when the trial began. Anticipating Rule 43(b)(1), the Court wrote:

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial . . . .

223 U.S. at 455 (emphasis added).

The limited nature of this ruling is underscored by the fact that in every case discussed by the Court in support of its holding in *Diaz*, the defendant had appeared at the commencement of trial, unlike the situation presented here. *See Barton v. State*, 67 Ga. 653 (1881)(defendant waived his right to be present at the reading of the verdict); *Falk v. U.S.*, 15 App.D.C. 446, 454 (1899), *rev'd on other grounds*, 180 U.S. 636 (1901)(mem.)(defendant had been present at commencement of the trial and for some testimony and then fled the jurisdiction).

In 1974, Rule 43 was amended to include subdivision (b)(2), which codified the Court's decision in *Illinois v. Allen*, 397 U.S. 337. *See* Notes of Committee on the Judiciary, House Report No. 94-247. In *Allen*, the Court held that,

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343.

Like *Lewis* and *Diaz*, the holding in *Allen* plainly assumes that the defendant will be present when the trial begins. A defendant cannot be removed after a warning unless he was present initially. Moreover, the facts of *Allen* support this reading, since Allen was present for a portion of *voir dire* before he began to disrupt the proceedings.[14]

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[14] One may argue that trial commences with opening arguments and not with *voir dire*. However, the case law does not support this view. The Court in *Diaz* recognized that in felony cases courts had extended the right to be present through all phases of the trial, from impaneling the jury to imposition of the verdict. *Diaz*, 223 U.S. at 454. The Court in *Lewis* also stated that, in a felony case, the trial begins at least from the time when the work of impaneling a jury begins. *Lewis*, 146 U.S at 374, *citing Hopt v. Utah*, 110 U.S. 574 (1884). The language of Rule 43(a) supports this view by describing the act of impaneling the jury as part of the trial process.

By contrast, Crosby was not present for any portion of the trial, including the impaneling of the jury.[15] This result is inconsistent with the case law relied on by the drafters of Rule 43, both when the Rule was first adopted and when it was amended in 1974.

C. The Decision To Conduct An Entire Trial Without The Presence Of The Criminal Defendant Raises Significant Constitutional Issues That This Court Should Not Address Until They Are First Considered By The Drafters Of Rule 43

It is axiomatic that statutes (and rules) should be construed to avoid constitutional questions whenever possible. *See DeBartolo v. Florida Gulf Coast and Const. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). The lower courts in this case followed precisely the opposite course by adopting a strained interpretation of Rule 43 that would permit an entire criminal trial to be conducted in the defendant's absence. This Court can and should correct that error by insisting that the constitutional values at stake first be weighed and considered by the drafters of Rule 43.

A defendant's right to be present at his own trial is firmly protected by both the Sixth and Fourteenth Amendments. In particular, the Sixth Amendment's Confrontation Clause protects a defendant's right to meet adverse witnesses face-to-face, and to cross-examine them. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). This allows the defendant to test the recollection of a witness and sift the witness' conscience. *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980). *See also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Moreover, a defendant's face-to-face confrontation with a witness may make it more difficult for the witness to lie on the stand. *See Coy v. Iowa*, 487 U.S. 1012 (1988)(Sixth Amendment was violated where a screen was placed between defendant and the child he allegedly raped).[16] Conversely, the absence of such confrontation calls into question the integrity of the proceedings even if defense counsel has an opportunity to cross-examine government witnesses in the defendant's absence. *Chambers*, 410 U.S at 95.

In addition to the Sixth Amendment, the decision to try a defendant *in absentia* also raises obvious due process concerns. Acknowledging this concern in *Kentucky v. Stincer*, 482 U.S. 730 (1987), the Court held that a defendant has a right to be present in court whenever the proceedings involve an opportunity to defend against the government's charges. *Id.* at 745, *citing Snyder v. Massachusetts*, 291 U.S. 97 (1934).

The nature of this due process interest was more fully explored in *Snyder*. As the Court explained in that case, a defendant must be present at trial "to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.* at 106.[17] This is par-

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[15] The district court's order, dated October 14, 1988, stated that fifty-four jurors were ready on October 12, 1988, the day the trial was to begin. *Crosby*, 917 F.2d at 363. This could only mean that a panel of potential jurors stood ready for *voir dire*, which had not yet begun.

[16] In *Coy*, the Court acknowledged that its encounters with the Confrontation Clause have generally been on questions of admissibility of out-of-court statements or on restrictions on the scope of cross-examination. 487 U.S. at 1016. A defendant's absence from trial presents a different question because, unlike the hearsay rule and cross-examination cases, the defendant has not confronted any witnesses at all. The question may more squarely focus our attention on why we value confrontation so highly that the integrity of judicial proceedings rests upon it.

[17] Although the Court found that the defendant did not have the right to be present when the jury was taken to the scene of the crime the (continued...)

ticularly true, as *Snyder* points out, "when evidence is offered." *Id.* at 114. *See also Powell v. Alabama*, 287 U.S. 45, 59 (1932); *Dowell v. United States*, 221 U.S. 325, 329-30 (1911).

The importance of these rights cannot be denied and, while they may not be absolute, they should not be overridden in the name of Rule 43 without some clear indication that this result was intended by the Rule's drafters. By ignoring this precept of judicial restraint, the decision below has raised constitutional issues that may never become ripe if Rule 43 remains in its present form. This Court should not compound that error by anticipating a constitutional controversy that can easily be avoided by applying Rule 43 as it is actually written.

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[17] (...continued)
defendant was convicted of committing, it rested the judgment on the fact that nothing was said to the jurors to direct their attention to particulars, taking care to distinguish the jury trip to the scene from the "trial."

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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